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October 18, 2010

Jeff S. Jordan  
Supervisory Attorney  
Complaints Examination and  
Legal Administration  
Federal Election Commission  
999 E Street, NW  
Washington, DC 22210

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
2010 OCT 18 PM 1:32  
OFFICE OF GENERAL  
COUNSEL

RE: MUR 6358, Americans for Prosperity

Dear Mr. Jordan:

Americans for Prosperity, a 501(c)(4) social welfare organization organized as a non-profit corporation under the laws of Washington, D.C., ("AFP") received the complaint designated as MUR 6358 on September 4, 2010. It requested and was granted a 31 day extension, and hereby provides this response on behalf of AFP.

The complaint claims that AFP violated the Federal Election Campaign Act by running an advertisement which the complainant avers "may have" been the result of coordinated efforts between AFP and the Jamie Herrera for Congress campaign. The Complainant presents absolutely no evidence whatsoever that any coordination actually occurred. Complainant simply speculates that "it appears that Americans for Prosperity may have coordinated its efforts with Herrera..." (emphasis added).

The Commission has repeatedly determined that complaints based on "mere speculation ... do not form an adequate basis to find reason to believe that a violation of FECA has occurred." Statement of Reasons in MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee); see also Factual and Legal Analysis in MUR 6077 (Norm Coleman et al.). Nevertheless, the Complaint states that the Commission "should investigate whether the AFP ad was coordinated with Herrera given the many apparent ties between people appearing in the advertisement and the campaign."

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The Commission does not undertake such fishing expeditions, and instead sensibly requires credible and actual evidence of wrongdoing as a predicate to finding reason to believe. As three Commissions have recently noted, "The RTB [reason to believe] standard does not permit a complainant to present mere allegations that the Act has been violated and request that the Commission undertake an investigation to determine whether there are facts to support the charges." MUR 6056 (Protect Colorado Jobs, Inc.), Statement of Matthew S. Petersen, Caroline C. Hunter, and Donald F. McGahn at 6, n.12.

Every other allegation in the complaint begins with the assumption that the advertisement in question in fact involved such coordination between AFP and the Jamie Herrera for Congress campaign. Complainant asserts that the alleged coordination resulted in an illegal in-kind contribution to Herrera's campaign, required AFP to register as a political committee, and should have been reported as an expenditure by AFP.

The advertisement complained of here was not coordinated in any way, and Complainant has provided absolutely no evidence of coordination. Thus, the complaint must be dismissed as to coordination. Every other allegation stems from this false premise, and should similarly be dismissed.

With no actual evidence of wrongdoing, this complaint amounts to nothing more than an attempt by incumbent politicians to intimidate and silence the voices of their policy opponents as dire consequences of the liberal become more apparent, and the popularity of their policies continues to decline.

This complaint is nothing more than a blatant attempt to use the First Amendment's prohibition that "Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" and twist it to have a regulatory agency function as censor of speech directly related to important public policy issues.

AFP hereby provides the Commission with the analysis below demonstrating why this advertisement was not the result of coordination between AFP and the Jamie Herrera for Congress campaign. As a result, the FEC has no basis to assert any jurisdiction over this advertisement or AFP.

**A. Americanas for Prosperity's Advertising was not the Result of Coordination Between AFP and the Jamie Herrera for Congress campaign.**

Under federal campaign finance law, coordination involves a public communication which identifies a candidate's opponent and occurs if three conditions are met. First, payment must have been made by an entity other than the candidate or candidate's committee. AFP paid for this advertisement, and does not dispute that it paid for the advertisement. Second, the advertisement must meet one of the content standards contained in 11 CFR § 109.21(c). AFP does not dispute that its advertisement mentions Denny Heck, a candidate for Congress, and aired within 90 days of the November 2, 2010 general election.

However, the complaint provides no evidence or information suggesting that AFP or the candidate engaged in any of the conduct described in the conduct standards in 11 CFR § 109.21(d).

First, there is no information that indicates that any of the three individuals identified in the complaint are or were agents of the candidate. All the complaint alleges is that one or more of these individuals have "close ties" to the candidate. To highlight this point, one of the individuals identified in the complaint is the *former* campaign manager for Jamie Herrera from when she was a candidate for non-federal office nearly two years ago. While perhaps interesting to some, this past association is of no legal significance today.

The two other individuals identified in the complaint are alleged to be "active" in "Republican organizations." Again, even if true, such "close ties" have absolutely no legal significance. As noted above, the Complaint has presented no evidence of any coordination by and/or through any of the named individuals.

The complaint asserts that "[i]t is implausible that Herrera's friends, former employees, party supporters, surrogates, and endorsers would have all agreed to appear in the AFP advertisement without the assent, substantial discussion or material involvement of Herrera or her campaign concerning the ad itself." Claims of "implausibility" by a complainant are a far cry from presenting actual evidence of assent, substantial discussion or material involvement.

An internal review of this matter found no evidence of any such assent, substantial discussion or material involvement. Without any specific, ~~framed allegations to rebut~~, it is impossible to respond with any more specificity, or otherwise prove that there was no such improper contact.

Even in the absence of such allegations or evidence, AFP wants to make clear to the Commission that both it and its vendor have in place internal firewall policies to prevent the sharing or discussion of AFP's plans and activities with any federal candidate or political party committee. The firewall policies of AFP comply with the rules provided at 11 § CFR 109.21 (h) and were acknowledged and understood by all of the personnel involved in the production of this advertisement. A copy of the firewall policy between AFP and its vendor, McCarthy Marcus Hennings (MMH) is included here as Attachment A. A copy of AFP's internal firewall policy is included here as Attachment B.

To further demonstrate the factual situation here, we have included as Attachment C, D and E, affidavits from the two AFP staff involved in the production of the advertisement and the producer from MMH. As these affidavits demonstrate, AFP and MMH were solely responsible for selecting the individuals who appeared in the ad in question, and did not engage in any communications or coordination with the campaign or its agents. The participants in the production of this advertisement has each signed the firewall policies or their employers, were well aware of the rule prohibiting coordination, and did not talk to the candidate or any agent of the candidate about the advertisement, as stated in their respective affidavits (See Attachments C, D and E.)

In summary, complainant has provided absolutely no evidence that AFP engaged in coordination. Since there is no allegation or evidence of wrongdoing in this case, there was no violation of 11 CFR § 109.21(d).

**B. Americans for Prosperity is not required to file with the Commission as a political committee and it is not required to file expenditure reports.**

Complainant alleges that Americans for Prosperity is required to file with the Federal Election Commission by virtue of being a political committee. Specifically, complainant asserts that AFP engaged in coordination, which resulted in an in-kind contribution to the Jamie Herrera for Congress campaign, and therefore AFP was required to have registered as a political committee. A group is only required to register with the Commission if it makes expenditures in excess of \$1,000 or receives contributions in excess of \$1,000 for the purpose of influencing a federal election and whose major purpose is the influencing of elections. See *Buckley v. Valeo*, 424 U.S. 1 (1976). Not only was there no coordination (and hence, no "in-kind contribution" to the Jamie Herrera for Congress campaign), Americans for Prosperity was not formed and is not operated for the purpose of influencing federal elections and any contributions received by the group have not been for that purpose.

In fact, the Americans for Prosperity is a 501(c)(4) social welfare organization:

...committed to educating citizens about economic policy and mobilizing those citizens as advocates in the public policy process. AFP is an organization of grassroots leaders who engage citizens in the name of limited government and free markets on the local, state and federal levels. The grassroots activists of AFP advocate for public policies that champion the principles of entrepreneurship and fiscal and regulatory restraint.

See <http://www.americansforprosperity.org/about> (visited September 28, 2010).

Americans for Prosperity was founded in 2004, and since that time has spent millions of dollars on legislative and grassroots advocacy efforts. In fact, Americans for Prosperity maintains an internal Board of Directors-approved policy that the organization does not take positions with respect to the election or defeat of candidates for public office – even in the wake of the Supreme Court's ruling in *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010).

For these reasons, Americans for Prosperity is not a federal political committee, and is not subject to the registration and reporting requirements of the Federal Election Campaign Act.

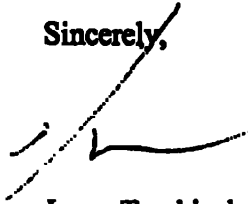
**Conclusion**

For the foregoing reasons, Americans for Prosperity respectfully requests that the Commission expeditiously dismiss the complaint, take no further action in this matter, and use this complaint as a vehicle to demonstrate that the Federal Election Commission will not violate

the First Amendment and act as censor silencing the policy views of those who oppose the views of candidates for public office.

Please do not hesitate to contact me at 540-341-8808 (telephone) or 540-341-8809 (fax) with questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jason Torchinsky', with a horizontal line extending to the right.

Jason Torchinsky  
Counsel for Americans for Prosperity

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